BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY (MARTIN) SMITH	)	
Claimant	)	
	)	
VS.	)	
	)	
GENMAR MANUFACTURING OF KS.	)	
Respondent	)	Docket No. 264,150
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the August 27, 2003 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on January 27, 2004.

APPEARANCES

Gary M. Peterson of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found clamant was entitled to a five percent functional impairment as well as a 56 percent work disability (based upon a 57 percent task loss averaged with a 55

percent wage loss) and an additional period of temporary total disability (TTD) benefits for the period June 19 through October 24, 2001.

The respondent requests review of the ALJ's findings relative to the nature and extent of disability, the entitlement to additional TTD benefits and an overpayment of TTD benefits.[1] Respondent filed no brief with the Board but at oral argument maintained the Award should be modified. At a minimum, respondent contends the wage loss analysis was inaccurately calculated and when corrected, would yield a 51 percent work disability. Respondent further argues the ALJ failed to impute at least a $7.00 an hour post-injury wage which would lessen the wage loss percentage and consequently the ultimate work disability award. Finally, respondent contends the ALJ inappropriately rejected the opinions of Dr. Hartman, who testified claimant had no permanent impairment or restrictions.

Claimant maintains that she "generally agrees with the Award" except as it relates to the ultimate functional impairment and work disability figures. Claimant maintains the record supports an increase from five percent to an 11 percent functional impairment. The difference between the two ratings stems from the injury she alleges to her left upper extremity. Claimant also argues that the evidence supports an 81 percent work disability rather than the 56 percent the ALJ awarded and asks the Board to modify the Award to reflect the higher work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in July 2000 as a machine operator. When operating the press she would have to lift large metal pieces weighing 30 to 35 pounds over her head and into a press. When operating the router she was required to pull pieces of metal across a table and secure them in the router for cutting.

Over time, claimant began to experience increased pain and discomfort in her neck and left shoulder as she was operating the press while bending and forming boat seats. In November 2000 claimant first notified respondent of her neck complaints. She was referred to an occupational health clinic and treated conservatively for neck pain. When her work activities were restricted respondent placed claimant in an accommodated

[1] The claim of overpayment is solely a computational issue and at oral argument claimant admitted her average weekly wage is not in dispute. Thus, the issue will be resolved in the final paragraph of the Order.

position as an engineering technician in the office performing computer work.[2] Claimant continued in this accommodated position, although with continued complaints of neck spasms and left shoulder pain.

In January 2001 claimant was seen by Dr. William R. Jones, a local orthopaedic surgeon. He continued to treat her conservatively and kept her on restricted duty in the office job. She was undergoing physical therapy but according to claimant, the treatments were not helping.

On February 13, 2001, both claimant and her husband-to-be were laid off from their jobs with respondent.[3] According to claimant, neither of them could find other employment and because it appeared that they were not going to be recalled in the near future, she and her husband moved to Missouri to live with relatives on March 21, 2001.[4] Her husband found full-time employment in Missouri.[5] Claimant was not employed during this time as she was expecting her fourth child.

While she was in Missouri, it appears that claimant's case "fell off the radar" and languished. Claimant was referred to Dr. Thomas R. Turnbaugh in June 2001 and apparently released to light duty. On June 22, 2001, respondent offered claimant a full-time job. This offer, however, was generic and did not expressly indicate that it would accommodate Dr. Turnbaugh's restrictions. Moreover, claimant was then residing in Missouri, some 400 miles away, where her husband had a full-time job. She could not reasonably commute and her husband, having no employment offers in Junction City, Kansas, could not be expected to quit his job. Still further, claimant was due to deliver a baby on August 20, 2001. After a period of conservative treatment Dr. Turnbaugh took claimant off work on October 25, 2001. During this period from June 19, 2001 to October 24, 2001, claimant testified that her neck and left shoulder continued to hurt.[6]

She was seen by an associate of Dr. Turnbaugh, a Dr. Ronald D. Carter, who also released her to light work, specifically limiting any lifting to ten pounds below the shoulder level and no lifting above shoulder level.[7] Following this office visit, respondent again offered employment, this time specifically within Dr. Carter's limitations. Again, claimant

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[2] R.H. Trans. at 50.

[3] P. H. Trans., Cl. Ex. 2.

[4] P. H. Trans. at 9 and 22.

[5] P. H. Trans. at 10 and 22.

[6] R. H. Trans. at 33.

[7] R. H. Trans., Cl. Ex. 6.

resided 400 miles away and her husband was fully employed. Thus, she did not accept respondent's offer of accommodation.

Following a preliminary hearing, the ALJ concluded claimant's decision to decline the offered employment was not "bad faith" and awarded TTD benefits commencing December 13, 2001.[8] Her treatment continued with Dr. Turnbaugh and those associated with him.

Claimant and her family were again forced to relocate to Indiana May 2002 when her husband lost his job in Missouri. Respondent then referred claimant to Dr. Feferman who released her from care in July 2002 without any restrictions or limitations.[9] At this point, all weekly benefits were terminated.

At her counsel's request, claimant was evaluated by Dr. Sergio Delgado, a board certified orthopaedist in October 2002. Dr. Delgado diagnosed chronic cervical and left girdle strain with ongoing musculoligamentous complaints. He also diagnosed a possible ulnar nerve entrapment at the left elbow. Dr. Delgado concluded, based on claimant's history, that her physical problems were related to her work activities for respondent. Dr. Delgado assigned a five percent permanent partial impairment to the body as a whole plus ten percent to the elbow, which when converted, yield an 11 percent to the body as a whole, consistent with the principles set forth in the *Guides*. [10] He recommended that claimant have a nerve conduction study to confirm the ulnar neuropathy but it appears that testing was never completed.

Dr. Delgado imposed the following restrictions: " avoid repetitive use of the left upper extremity."[11] Relating solely to the neck, he limited any "lifting in excess of 15 to 20 pounds, occasionally up to 30, avoid heavy lifting from shoulder at the overhead level."[12] When asked to consider claimant's task loss, Dr. Delgado utilized Monte Longacre's task analysis of claimant's work history.[13] According to Dr. Delgado, claimant bears a 62

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[8] ALJ Order (Feb. 7, 2002).

[9] R. H. Trans. at 35-36.

[10] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). Unless otherwise indicated, all references to the *Guides* are to the 4th edition.

[11] Delgado Depo. at 12.

[12] Delgado Depo. at 12.

[13] Mr. Longacre created a list of 37 tasks based on his telephonic interview of claimant.

percent task loss.[14] When the elbow restrictions are eliminated, the resulting task loss is 57 percent.

In late October 2002, claimant began looking for work. According to claimant, until she received Dr. Delgado's report, she was uncertain as to her restrictions. Claimant went on to testify that she has looked for jobs that will pay a minimum of $7.00 per hour and has specifically excluded any jobs that might pay less. Her counsel argues that "an injured worker should not have to look for or accept employment that pays a wage so disproportionate to the worker's pre-injury average weekly wage that the worker is disgraced, belittled, and embarrassed to the point that the worker loses his or her self-esteem."[15] Counsel goes on to argue "the claimant has small children and any additional cost that has to be made for their care because claimant is working would completely diminish the $206 weekly wage [ultimately imputed by the ALJ] she would receive in a minimum wage job."[16] Claimant has gone online looking for jobs, posting her resume and she's registered with an employment agency but has not worked since leaving respondent's employ.

At respondent's request, claimant was also evaluated by Dr. Michael Hartman, an orthopaedic spine surgeon in Elkart, Indiana. Dr. Hartman saw claimant in May 2003 and at that time she described her condition as one that "built up over time" as claimant was pulling, shifting things over head.[17] Dr. Hartman performed an examination and identified several areas of abnormalities, including pain at all extremes of range-of-motion, pain on palpation of the base of the skull, the posterior cervical-spine and cervical thoracic-spine, decreased sensation to light touch and the pulp of her middle finger on the left, the ulnar aspect of her little finger on the left and the medial aspect of her forearm, lateral aspect of the arm.[18] He also reviewed the MRI films of claimant's left shoulder and neck. He identified some narrowing at C3-4, C4-5, C5-6, and C6-7 with mild degenerative changes at C6-7.

Dr. Hartman diagnosed "neck pain and left-upper extremity radiculopathy" of unknown etiology. [19] Specifically, he stated "I have no basis - medically - to explain her discomfort based on the physical exam findings and based on the radiographic reports and

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[14] Delgado Depo. Ex.3.

[15] Claimant's Brief in Response to Respondent's Application for Review at 13.

[16] *Id.* at 13.

[17] Hartman Depo. at 7.

[18] *Id.* at 8.

[19] *Id*. at 10.

the radiographs that I took."[20] As a result, Dr. Hartman was not willing to assign any permanency under the *Guides* as he concluded claimant had not suffered any work-related injury, in particular no specific underlying event.[21] Likewise, he found no task loss attributable to her work activities.[22]

Upon cross examination, Dr. Hartman testified that he believes it is less likely for any one with a strain or sprain to sustain a permanent impairment and in fact, Dr. Hartman has never had occasion to issue an impairment for a soft-tissue, muscle, chronic strain/sprain situation.[23] Taken as a whole, it is clear from Dr. Hartman's testimony that he is unfamiliar with the concept of repetitive use-type injuries and does not recognize that as a ratable event under the *Guides*.

The primary issue on appeal is the nature and extent of claimant's impairment. The ALJ awarded a five percent functional impairment based upon Dr. Delgado's opinions relating to the chronic neck strain/sprain and left shoulder girdle strain/sprain which arose out of and in the course of her employment with respondent.[24] The ALJ went on to disregard Dr. Delgado's opinions as to claimant's ulnar neuropathy and its relationship to claimant's work activities thus limiting her functional impairment to the five percent. The ALJ reasoned that because Dr. Delgado could not articulate when the claimant developed the symptoms of numbness which were indicative of a neuropathy and because she was laid off February 13, 2001, despite not having worked anywhere since that date, any signs of neuropathy which arose after her layoff would "probably not be attributable to her employment."[25]

Claimant suggests that by admitting claimant suffered an accidental injury to her left upper extremity during the prehearing settlement conference, the ALJ should have included that portion of Dr. Delgado's opinion relating to her elbow in the final impairment award. The Board disagrees. Although respondent admitted accidental injury to claimant's left upper extremity, that does not foreclose a dispute as to the ultimate nature and extent of any particular condition and/or permanency. Respondent did not stipulate to a functional impairment during the prehearing settlement conference. Thus, the ALJ was free to

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[20] *Id*. at 10.

[21] *Id.* at 10 and 19.

[22] *Id.* at 11.

[23] *Id.* at 29.

[24] ALJ Award (Aug. 27, 2003) at 3.

[25] ALJ Award (Aug. 27, 2003) at 3.

evaluate the evidence and make a finding as to whether her "possible" ulnar nerve entrapment was causally related to her work.

After reviewing the evidentiary record filed herein and considered the parties' briefs and oral arguments, the Board finds the ALJ's award of five percent should be affirmed. The ALJ was correct when he focused on the fact that Dr. Delgado, the only physician to rate the ulnar neuropathy complaints, could not identify the onset of those complaints, specifically the numbness. By the time Dr. Delgado saw claimant, she had not worked for respondent for over two years. The bulk of her complaints during her treatment were to her neck and left shoulder. Thus, the Board agrees that it is more probably true than not that the elbow complaints bear no causal relationship to claimant's work activities up to February 13, 2001. As for Dr. Hartman's opinions, the Board, like the ALJ, does not find them as credible as those of Dr. Delgado in light of the medical records and claimant's testimony.

Respondent also takes issue with the ALJ's Award of 56 percent work disability. Respondent points out that if the Board finds claimant is entitled to a work disability based upon the same task and wage loss findings made by the ALJ, then the Award must nonetheless be modified as the ALJ erroneously calculated the wage loss. The claimant did not take issue with this contention and in fact, respondent's counsel is correct.[26]

Respondent also argues that the ALJ should have imputed a higher wage to claimant as she self-limited her job search to those positions paying $7.00 and higher. According to her counsel, this criteria was imposed because to do otherwise would cause her to be "disgraced, belittled, and embarrassed," so much so that she would lose her self-esteem. While this is an interesting argument and there is some validity to the theory that working for a vastly lower wage can be illogical given the costs involved in working, the Board finds the argument unpersuasive under these facts. Moreover, the Act does not indicate such emotional factors should be considered when determining whether a claimant has demonstrated "good faith" in searching for appropriate employment.[27]

Once claimant received Dr. Delgado's restrictions in October 2002, she made a significant effort to find work in Indiana but limited her work search for positions that would pay at least $7.00 an hour. However, none of these efforts have been successful. Monte Longacre suggests she could expect to earn $6.50 as a cashier or in a fast food restaurant, although he did not testify as to the availability of those jobs where claimant resides and there is no suggestion in the record that he has any familiarity with the job market in her area of Indiana. Thus, his figures lack a credible foundation. Nonetheless, the Board finds

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[26] The ALJ found a pre-injury wage of $376.90 and when that is compared to an imputed wage of $206 per week, the resulting wage loss is 45 percent, not 55 percent as indicated in the Award.

[27] *See e.g.*, *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the ALJ's decision to impute an average weekly wage of $5.15 per hour, for a total of $206 per week, was appropriate. By artificially restricting her search to those jobs paying $7.00 and over, claimant has inappropriately limited her employment prospects.

As for the task loss component, the Board finds no error in the ALJ's analysis. Claimant's elbow complaints are not compensable thus any task limitations related to such complaints must be removed from the task loss analysis. The ALJ found a 57 percent task loss and that finding is affirmed. When the 57 percent task loss is averaged with the 45 percent wage loss, the resulting figure is 51 percent. The Award is hereby modified and claimant is granted a 51 percent work disability.

Finally, respondent claims claimant is not entitled to TTD benefits for the period June 19 through October 24, 2001, suggesting there is no evidence contained within the record that she was off work due to her injury. While respondent's counsel is correct that claimant was pregnant during this period of time, she was also under restrictions and had not yet been released to full duty. She testified that she continued to have problems during this period and was undergoing treatment, albeit conservative due to her pregnancy. Her pregnancy, standing alone, does not invalidate her claim for TTD benefits. The Board finds claimant is entitled to additional TTD benefits for the additional period of 18.14 weeks at the weekly rate of $251.28. The respondent has already paid benefits from February 14, 2001 to June 18, 2001 and from May 10, 2003 to July 15, 2003.[28] For future reference, the parties would serve their clients' well to provide the Board with a written brief when issues relating to TTD benefits are in dispute. It is often difficult to grasp the numerical contentions of the parties during oral argument.

All other findings are affirmed to the extent they are not modified by the above findings and conclusions.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated August 27, 2003, is affirmed in part and modified in part as follows:

The claimant is entitled to 83.86 weeks of temporary total disability compensation at the rate of $251.28 per week or $21,072.34 followed by 17.31 weeks of permanent partial disability compensation at the rate of $251.28 per week or $4,349.66 for a 5 percent functional disability followed by 159.22 weeks of permanent partial disability compensation

[28] This last period of TTD was awarded by the ALJ pursuant to respondent's request for an extension of its terminal date. See ALJ Award at 5.

at the rate of $251.28 per week or $40,008.80 for a 51 percent work disability, making a total award of $65,430.80.

As of February 9, 2004 there would be due and owing to the claimant 83.86 weeks of temporary total disability compensation at the rate of $251.28 per week in the sum of $21,072.34 plus 72 weeks of permanent partial disability compensation at the rate of $251.28 per week in the sum of $18,092.16 for a total due and owing of $39,164.50, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $26,266.30 shall be paid at the rate of $251.28 per week for 104.53 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

Dissent

I respectfully disagree with the majority's decision to impute a post-injury wage based upon the federal minimum wage. I find that claimant established she has made a good faith effort to find appropriate employment and, therefore, she has sustained a 100 percent wage loss for that prong of the permanent partial general disability formula. Claimant should not be penalized for applying for better paying jobs as long as those contacts are sufficient in quantity and otherwise appear reasonable. Conversely, in some instances, it could be argued that a worker who seeks and finds a lower paying job is underemployed and, thus, manipulated the wage loss prong of the permanent partial general disability formula. The test is whether claimant has made a good faith effort to find appropriate employment and claimant has satisfied that test.

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BOARD MEMBER

c: Gary M. Peterson, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula Greathouse, Workers Compensation Director